Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAN ANDERSON

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN APPLYING A STANDARD FOR ESTABLISHMENT OF THE ATTORNEY-CLIENT PRIVILEGE FOR A CORPORATE EMPLOYEE WHICH PRECLUDES RELIANCE ON THE ATTORNEY-CLIENT RELATIONSHIP BASED UPON DUAL REPRESENTATION AND REASONABLE BELIEF.

II. WHETHER, ONCE THE DISTRICT COURT DETERMINED THAT THE CRIME-FRAUD EXCEPTION APPLIED WITH RESPECT TO CONSULTING AGREEMENTS BETWEEN DOCTORS AND A HOSPITAL, IT COULD INDISCRIMINATELY DECLARE THAT EVERY ACT OR COMMUNICATION WITH COUNSEL ABOUT THE ASSOCIATION DURING THE TEN YEAR RELATIONSHIP WAS SUBJECT TO DISCLOSURE UNDER THE EXCEPTION.

LIST OF PARTIES

The Petitioner is Dan Anderson

The Respondent is the United States of America

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PRIOR OPINIONS IN THIS CASE

The Order of the United States District Court for the District of Kansas in this matter is unreported but appears in the Appendix at xxi. The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is reported in 144 F.3d. 653 (10th Cir. 1998), and appears in the Appendix at ii. The Order of the United States Court of Appeals for the Tenth Circuit denying the Petition for Rehearing and/or Rehearing En Banc is unreported, but appears in the Appendix at xxv.

JURISDICTIONAL STATEMENT

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 15, 1998. The Court of Appeals thereafter denied Petitioner's timely filed Petition for Rehearing and/or Rehearing En Banc on June 23, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, as well as the exception to the final order rule delineated in *Pearlman v. United States*, 247 U.S. 7 (1918). This Petition is filed under S.Ct. R. 12.1.

STATEMENT OF THE CASE

A grand jury in the District of Kansas, investigating allegations of criminal conduct stemming from a business

relationship between Baptist Medical Center[1] (hereinafter "BMC") and the Blue Valley Medical Group (hereinafter "BVMG"), and Doctors Ronald and Robert LaHue, extending from 1984 through 1994, issued numerous subpoenas duces tecum and testimonial subpoenas. The focus of the investigation centered around the negotiation and implementation of consulting agreements between BMC and BVMG. Petitioner Dan Anderson served as BMC's president and chief executive officer. Attorneys for BMC and Mr. Anderson, Ruth Lehr and Mark Thompson, at various and separate times, advised their clients in the negotiation and implementation of consulting agreements in 1985 and 1986, as well as drafted proposed agreements, never executed in 1992 and 1993.

In November of 1996, government agents sought to interview both attorneys. BMC invoked the attorney-client privilege and declined to permit the interviews. Thereafter, on or about December 8, 1996, the grand jury issued subpoenas to both Lehr and Thompson to appear before the grand jury on January 21, 1997.[2] Attorneys representing

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1 The original record before the district court was sealed due to the ongoing grand jury proceedings. Subsequently, following the return of indictment in the case, the district court ordered that the record, exclusive of *in camera* proceedings and grand jury transcripts, be unsealed. Due to the now public disclosure of the individuals and entities enumerated herein, as referenced in the Government's indictment, pseudonyms have not been used. A related case, *In Re Grand Jury Proceedings*, 97-3389 was heard by the Tenth Circuit and an opinion entered on August 31, 1998. ___ F. 3d ___, 1998 WL 564733.

2 At this time the Government did not allege that the attorneys were targets of the investigation. In fact, prior to the assertion of the attorney-client privilege by the attorneys, at the direction of BMC and Petitioner, the government avowed no intentional criminal conduct by the attorneys; from the government's perspective, they were simply unwitting participants.

BMC and the individual attorneys filed Motions to Quash Grand Jury Subpoena Ad Testificandum on January 16, 1997. Petitioner filed a Motion to Intervene and Quash Grand Jury Subpoena, or in the Alternative, for a Protective Order to Prohibit the Government from Propounding Grand Jury Questions to the attorneys. The Government filed a Response to the Motions to Quash, and simultaneously filed an *In Camera* and *Ex Parte* Good Faith Statement. While Petitioner as yet to see this document, it purported to establish that BMC and Mr. Anderson sought legal advice for the purpose of carrying out a crime or fraud, thereby vitiating the attorney-client privilege.

On February 24, 1997, the Hon. Kathryn Vratil, United States District Judge, held hearings on the motions to quash. The Court permitted Mr. Anderson to intervene. Numerous issues were raised during this hearing, including whether or not the assertion of the crime-fraud exception permitted an unfettered inquiry of the attorneys as to all matters relayed during the course of their representation.[3] The Petitioner, as well as the other movants, argued against carte blanche inquiry, and rather contended that the privilege could only be breached and the crime-fraud exception applied, if the Court knew what questions the Government

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3 The Court also addressed the procedures used to determine the crime-fraud exception, including whether the Petitioner and other movants were entitled to review the *In Camera* and *Ex Parte* Good Faith Statement (no); whether or not the Petitioner and the other movants would be permitted to rebut the Government's alleged *prima facie* submission supporting the crime-fraud exception (no); and the standard to be used to determine whether a *prima facie* showing had been made (more than a suspicion and less than a preponderance of the evidence.)

intended to ask, or at the very least, the nature of the privilege material raised.

During the hearing, in its colloquy with the parties, the district court suggested that if the relationship between BMC and the doctors was a violation of federal law, it was clear that the services of the attorneys were used in furtherance of that scheme or that they were closely related to the criminal activity; that as the district court understood the crime-fraud exception, the privilege, in no context, could survive as to all advice and communications between the clients and the attorneys regarding the subject matter, i.e., negotiation and drafting of the consulting agreements. Ultimately, the district court found that the Government had made a *prima facie* showing sufficient to establish the crime-fraud exception and ordered that the two attorneys testify before the grand jury. However, the district court held that, while the record would not support a blanket assertion of the work product doctrine or attorney-client privilege, it recognized the need to develop the record. The court concluded that it would reconsider its ruling based upon specific questions and answers raised during the course of the attorneys' testimony before the grand jury.

On March 19, 1997, Ms. Lehr appeared before the grand jury and asserted attorney-client privilege, the work product doctrine, and at Mr. Anderson's request, vicarious fifth amendment privilege. On March 25, 1997, the Government filed a motion to compel Ms. Lehr's testimony. Subsequently on April 2, 1997, Mr. Thompson appeared before the grand jury and at the direction of BMC and Petitioner, asserted the attorney-client privilege and work product doctrine in refusing to answer questions.

The district court held another hearing on April 2, 1997. At the beginning of the hearing, the Government orally moved for the compulsion of Mr. Thompson's testimony. The Government, for the first time, also objected to the intervention by Mr. Anderson. The district court preliminary granted Mr. Anderson leave to intervene, subject to presentation of evidence to establish the attorney-client privilege. Mr. Thompson testified that he represented both BMC and Mr. Anderson from March, 1991 to the present and during that period of time he had rendered personal advice to Mr. Anderson; that he believed he had an attorney-client relationship with Mr. Anderson; and that he shared work product with Mr. Anderson. Ms. Lehr testified that she had given Mr. Anderson personal advice; that she shared work product with him, and that on occasions she had an express oral or written agreement with Mr. Anderson to represent him as an individual and not in his capacity as CEO of BMC. Both attorneys testified that Mr. Anderson approached them for the purpose of seeking personal legal advice; that the attorneys understood that Mr. Anderson was seeking the advice in an individual capacity rather than as CEO of BMC; that Mr. Anderson sought advice and they represented Mr. Anderson as an individual regarding his potential personal liability and risks with respect to the relationship between BMC and BVMG under Medicare fraud and abuse guidelines; and that they recognized possible conflict issues but generally believed that no conflict of interest existed based upon the interests of both BMC and Mr. Anderson. The court continued the hearing until April 7, 1997.

Prior to the April 7 hearing, the Government, in a supplemental motion filed with the district court, for the first time in its five year investigation, made vague allegations that Ms. Lehr and Mr. Thompson had knowledge of the alleged

fraud. At the commencement of the April 7 hearing, the district court heard evidence from Mr. Anderson regarding his privileged relationship with each attorney. Mr. Anderson stated that he sought personal and individual legal advice from both attorneys in order to protect himself from possible legal exposure in the area of health care fraud and abuse. Based upon Mr. Anderson's testimony, as well as the evidence from Ms. Lehr and Mr. Thompson, the district court held that the attorneys provided joint representation to BMC and Mr. Anderson in his individual capacity, therefore affording Mr. Anderson the right to intervene.

The district court then addressed the propriety of reviewing the individual questions to be submitted to the attorneys in order to determine the scope of the crime-fraud exception. The court, after argument by counsel, indicated that it would find that from late 1984 through 1994, the crime- fraud exception would apply and "just for the point and sake of picking an arbitrary date to make late 1984 clear, it would say September 1, 1984." Further, it found for the purposes of the scope, it would broadly incorporate anything that had to do with the doctors' relationship with BMC. BMC and Mr. Anderson argued that even if the district court believed that a *prima facie* showing had been made to create a crime-fraud exception to privilege, that the inquiries posed by the government before the grand jury could violate the work product doctrine; that the work product doctrine survived the unwitting involvement of the attorneys unless the court reached a conclusion that the attorneys were participants in the fraud. It was only then that the Government, which had never alleged in any motions or hearings prior to April 4, 1997, that the attorneys had, themselves, engaged in illegal activity, and asserted that it could make an *in camera* presentation supporting a finding

that the attorneys were co-conspirators to the crime to create "sham" agreements and cover up an illegal kick-back scheme.

The district court permitted the Government to make a second, *in camera* and *ex parte showing*. Following the government's presentation, it held that the Government had made a *prima facie* showing that the two attorneys had aided and abetted the conspiracy. As such, the district court extended the crime-fraud exception to include the attorney's work product.

Based upon the district court's ruling, counsel for the two attorneys represented to the court that the attorneys would not take contempt and would in fact honor the court's order of compulsion. Counsel for BMC and Mr. Anderson then expressed their intent to file Motions to Stay and to seek review by the United States Court of Appeals for the Tenth Circuit. Mr. Anderson, in fact, filed a Motion to Stay Pending Appeal on April 7, 1997. On May 1, 1997, the district court entered a written order wherein it granted the Government's Motion to Compel testimony of the two attorneys, denied Mr. Anderson's request that the attorneys be allowed to vicariously assert his fifth amendment privilege before the grand jury, and granted the Motions to Stay Proceedings. The district court's jurisdiction was invoked pursuant to 18 U.S.C. § 3231, Fed. R. Crim. P. 6(e) and Fed. R. Civ. P. 17(c).

Mr. Anderson timely filed his notice of appeal as to the district court's order to compel the testimony of Ms. Lehr and Mr. Thompson, invoking jurisdiction of the court of appeals under the limited *Perlman* exception. Following briefing and oral argument, the Tenth Circuit entered its Order on May 15, 1998, affirming the district court's (1) application of the crime-fraud exception to the attorney-

client privilege; (2) scope of the exception; (3) discretion to refuse to disclose or permit rebuttal of the government's *in camera, ex parte* showing that the crime-fraud exception applied; and (4) prohibition of the attorneys invoking Mr. Anderson's fifth amendment right against self-incrimination. The Government had, on appeal, raised the standing of Mr. Anderson to intervene. The Tenth Circuit found that limited standing applied, adopting the test employed by the Second and Third Circuits, but limited the communications to only those where Mr. Anderson sought legal advice as to his personal liability without regard to any corporate consideration. The Court of Appeals held that the privilege did not extend to communications made while third parties were present or to communications discussing both corporate and individual liability. Thereafter, on June 23, 1998, the Court of Appeals denied Petitioner's timely filed Petition for Rehearing and/or Rehearing En Banc.

This appeal follows, and jurisdiction is invoked pursuant to 28 U.S.C. § 1254, S.Ct. R. 13.1, and *Perlman v. United States*, 247 U.S. 7 (1918).

ARGUMENT

I. WHETHER THE COURT OF APPEALS ERRED IN APPLYING A STANDARD FOR ESTABLISHMENT OF THE ATTORNEY-CLIENT PRIVILEGE FOR A CORPORATE EMPLOYEE WHICH PRECLUDES RELIANCE ON THE ATTORNEY-CLIENT RELATIONSHIP BASED UPON DUAL REPRESENTATION AND REASONABLE BELIEF.

The Court of Appeals for the Tenth Circuit made three fundamental errors in its opinion which, when observed, eradicates the very core purposes of the attorney client privilege and impermissibly places extraordinary restrictions on corporate employees or officers seeking to assert the privilege. It erroneously held that (1) a personal attorney-client privilege does not exist merely because the corporate officer "reasonably believed" that he was being represented by corporate counsel on an individual basis. Incongruously the court of appeals insisted that "[i]n certain circumstances, reasonable belief may be enough to create an attorney-client *relationship*, but it is not sufficient here to create a personal attorney-client privilege;"(2) that the privilege could not extend to communications made while third parties were present, thereby precluding the application of the privilege to communications made under a joint defense agreement or the common interest doctrine; and (3) that the privilege could not extend to communications which implicated both corporate and individual liability and that the corporate employee or officer seeking to assert the privilege could only do so with respect to communications wherein he sought legal advice as to personal liability without regard to any corporate considerations.

A. Introduction

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Swidler & Berlin and Hamilton v. United States*, __ U.S.__, 118 S.Ct. 2081, 2084 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. at 389. Existence of the privilege rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, and that these benefits out-weight the risks posed by barring full revelation in court. Weinstein & Berger, Weinstein's Evidence § 503[2] (1994); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976). While not every communication between an attorney and client is privileged, the privilege must be construed with the logic of its principles. *United States v. Weger*, 709 F. 2d 1151, 1154 (7th Cir. 1983). This Court has held that its interpretation of the scope of the attorney-client privilege is guided by "the principles of the common law . . . as interpreted by the courts . . . in light of reason and experience." *Swidler & Berlin and Hamilton v. United States*, __U.S. at __, 118 S.Ct. at 2084.

In general, the attorney-client privilege exists: (1) where legal advice of any kind is sought; (2) from a professional legal advisor in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance

permanently protected; (7) from disclosure by himself or the legal advisor; (8) except by waiver. See J. Wigmore, Evidence § 2292-9 (McNaughton rev. ed. 1961). This Court has long recognized the significance of the privilege, holding that the interests of justice require that clients utilize attorney's services free from consequences of, or apprehension of, disclosure. *See Swidler & Berlin and Hamilton v. United States*, __U.S. at __, 118 S.Ct. 2081 (1998) (the attorney-client privilege survives death); *see also*, *Fisher v. United States*, 425 U.S. at 403; *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The privilege covers verbal statements, documents and tangible objects conveyed by the client to an attorney, in confidence, for the purpose of obtaining legal advice. Further the privilege applies to both oral and written confidential communications, either originating from the client or from the lawyer in response to a client's inquiry. *Upjohn Co. v. United States*, 449 U.S. at 389; *Haines v. Liggett*, 975 F. 2d 81, 90 (3d Cir. 1992). The privilege belongs only to the client and only the client may waive the privilege. *Haines v. Liggett*, 975 F. 2d at 90; *S.E.C. v. First Sec. Bank of Utah*, 447 F. 2d 166, 167 (10th Cir. 1971), *cert. denied*, 404 U.S. 1038 (1972)

Since a corporation is an intangible entity, all communications with attorneys are done by the employees, officers or agents for the corporation. Thus the attorney-client privilege may be created by the communications made by individuals on behalf of the corporation; but the scope of the privilege generally applies only to the corporation. *Upjohn Co. v. United States*, 449 U.S. at 383. A corporate client generally possesses the privilege as well as the power to assert or waive the privilege. *CFTC v. Weintraub*, 471 U.S. 343 (1985). Thus under ordinary circumstances an employee cannot, himself, claim the attorney-client privilege and prevent disclosure of communications between himself

and corporate counsel. *See Diversified Indus. v. Meredith*, 572 F. 2d 596, 611 fn. 5 (8th Cir. 1978). Yet in *Upjohn*, this Court refused to undertake the drafting of a set of rules which created a "cookie-cutter" approach to the resolution of privilege issues, but rather clearly stressed the importance of predictability when determining the scope of the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. at 393 ("if the attorney-client privilege is to be served, the attorney and client must be able to predict, with some degree of certainty, whether particular discussions will be protected.")

Circumstances may occur wherein an employee or officer of a corporation seeks legal advice from the corporation's legal counsel for himself or counsel acts as a joint attorney. Under such circumstances dual representation may exist and the employee may likewise invoke the privilege. *See Diversified Indus. v. Meredith*, 572 F. 2d at 611, fn. 5 (8th Cir. 1977); *see generally United States v. International Bd. of Teamsters*, 119 F. 3d 210, 215 (2d Cir. 1997); *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F. 2d 120, 123 (3d Cir. 1986); J. Gergacz, Attorney-Corporate Privilege, Clark Boardman Callaghan (2d ed. 1990) pp. 2-9.

B. The Proper Standard for Determination of the Attorney-Client Privilege is Reasonable Belief Because It Does Not Place the Burden on the Client and Provides Predictability and Reliability

The Court of Appeals's opinion held that "[a] personal privilege does not exist merely because the officer'reasonably believed' that he was being represented by corporate counsel on an individual basis," citing,

International Bd. of Teamsters, 119 F. 3d at 215. The Court further held that

> [i]n certain circumstances, reasonable belief may be enough to create a personal attorney-client *relationship* but it is not sufficient here to create a personal attorney-client privilege.

The lower court concluded that the appropriate test for establishing the attorney-client privilege for a corporate officer or employee was that adopted in the Second and Third Circuits. That five prong test requires a showing that (1) the individual approached counsel for the purpose of seeking legal advice; (2) that when he approached counsel he made it clear that he was seeking legal advice in his individual capacity rather than in an representative capacities; (3) that counsel saw fit to communicate with the individual in the individual capacity, knowing that a possible conflict could arise; (4) that the conversations with counsel were confidential; and (5) that the substance of the conversations did not concern matters within the company or the general affairs of the company. See *International Bd. of Teamsters,* 119 F. 3d at 215; *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F. 2d at 123.

Petitioner contends that the opinion of the court of appeals adopted an incorrect and overly burdensome standard for a corporate officer or employee's assertion of the attorney-client privilege. Rather, the proper standard as enunciated in the Seventh Circuit and previously recognized by the Tenth Circuit but inexplicably ignored by the court in this case, is the reasonable belief standard. *See United States v. Walters*, 913 F. 2d 388, 392 (7th Cir. 1990); *Wylie v. Marley Co.*, 891 F. 2d 1463, 1471 (10th Cir. 1989); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F. 2d

1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). The reasonable belief standard recognizes that the professional relationship for purposes of the privilege hinges upon the belief that one is consulting a lawyer for professional legal advice and the individual's manifested intent to seek legal advice. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F. 2d at 1319; see also *Wylie v. Marley Co.*, 891 F. 2d at 1471. The Tenth Circuit had expressly found that an attorney-client relationship may exist between a corporate officer or employee and corporate counsel when the employee could have reasonably believed that counsel was representing him personally as well as representing the corporation. *Id.* This reasonableness test is not solely subjective. In the absence of clear indication by the potential client to the attorney that he believed he was being represented, the attorney-client relationship can only be inferred if there is some finding that the client's subjective belief was reasonable under the circumstances. *See United States v. Keplinger*, 776 F. 2d 678, 701 (7th Cir.), *cert. denied*, 476 U.S. 1183 (1985).

Unfathomably, the court of appeals in the present case, attempted to distinguish attorney-client *relationships* from the attorney-client privilege itself. This inane distinction is even more unexplainable when the lower court had previously recognized that the core element of the privilege is the relationship between client and attorney which promotes full and frank communications. *Wylie v. Marley Co.*, 891 F. 2d at 1471; *see also Upjohn Co. v. United States*, 449 U.S. at 389; *Trammel v. United States*, 445 U.S. 40, 51 (1980).

While Petitioner does not dispute that the first four factors of the five prong test adopted by the Second and Third Circuits are, *arguendo*, consistent with a reasonable belief standard, the fifth factor effectively prohibits any

employee or corporate officer from having a personal and individual attorney-client privilege with corporate counsel irregardless of whether counsel and the corporation had determined that no conflict existed, or the parties waived any potential conflict, and based upon common interests, entered into a dual representation relationship. Requiring a finding under the fifth prong, that the privilege does not attach if the substance of the conversations concerns matters within the company or the general affairs of the company places the onus on the individual to recognize he uses corporate counsel at his own peril, rather than on the attorney and/or corporation, individuals or entities which are in the better position to assert conflicts and/or control the corporate attorney. The corporate attorney is certainly in the best position to develop mechanisms to avoid ethical dilemmas; conflicts with existing as well as potential clients. The attorney is the "repeat player," the one who will continually face the problem and "sets the tone for the initial meeting or contact with an individual." See Perschbacher & Perschbacher, 3 Geo. J. Legal Ethics 689, 704-05 (Part II.B.) (1990). The lawyer is the one who knows the ethical rules; has the legal background which should enable him to avoid and/or anticipate conflicts under possible scenarios. *Id.*[4] It is the lawyer, not the client, who has the ability to avoid the impropriety and therefore it is appropriate that the consequences which follow when a lawyer fails to exercise that ability fall to the lawyer and not the client. In essence,

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4 The American Bar Association discusses the measures to be taken by attorneys to avoid conflicts in ABA Formal Ethics Opinion No. 90-358 (1990), which outlines the various ethical rules that require every lawyer to adopt reasonable procedures to determine actual or potential conflicts of interest. See Model Rules of Professional Conduct 1.6, 1.7, 1.13 and comment (adopted by the Kansas Supreme Court as the Rule of the Court for the standards of professional conduct in Kansas.)

the lay person, whether a corporate employee, officer, or a person not associated with a corporation, who has reasonably relied on the attorney-client relationship to relay confidential matters to his counsel, should not be penalized if in hindsight his counsel failed to disclose to him , either negligently, intentionally, or mistakenly that a conflict exists or that a conflict or circumstance could arise which would vitiate the privilege. Such uncertainty is inconsistent with this Court's explicit desire to provide predictability for clients and to ensure the continued protections which are inherent within the privilege.

An additional rationale supporting a reasonable belief standard is that, in the absence of such a confidentiality standard, no person could safely consult an attorney, for the first time or at any time. A potential or existing client can only receive the best legal advice if he fully discloses the facts underlying his legal difficulty, and this he will only do if he believes that his disclosures will be in confidence. *See Upjohn Co. v. United States*, 449 U.S. at 389; *Trammel v. United States*, 445 U.S. at 51. Once again, a client may be placed in a position of uncertainty as to privileged communications, of no fault of his own. This is not consistent with the common law origins of the privilege or the principles set forth by this Court. The only logical and consistent manner of determining whether an attorney-client relationship exists is through the Reasonable Belief Standard.

C. Application of the Fifth Prong Ignores Joint Defense Agreements or the Common Interest Doctrine

The Court of Appeals decision, rather than creating predictability, raises more questions as to the application of the privilege to the individual client who happens to also be a

corporate officer. The lower court, in determining that the fifth prong of the Second and Third Circuit tests apply, concluded that the privilege would not extend to communications made while third parties were present or which concerned matters within the company or the general affairs of the company.

The "common interest" or "joint defense doctrine" generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence not only to his own lawyer, but to an attorney for a co-defendant for a common purpose related to the defense of both. *United States v. Keplinger*, 776 F. 2d at 701. A similar general rule, sometimes called the "common defense rule" protects communications by a client to his own lawyer when the lawyer subsequently shares them with co-defendants for purposes of a common defense. *See United States v. McPartlin*, 595 F. 2d 1321, 1336-1337 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). The joint defense privilege is an extension of the attorney-client privilege. *United States v. Schwimmer*, 892 F. 2d 237, 243-44 (2d Cir. 1989); *Waller v. Financial Corp. of Am.*, 828 F. 2d 579, 583 n.7 (9th Cir. 1987). Such a privilege, applying to only those communications made in the course of the ongoing common enterprise and intended to further the enterprise are protected, and serves to protect the confidentiality of communications passing from one party to the attorney of another party where a joint defense effort or strategy is agreed to and undertaken by the parties. *See United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F. 2d 20, 28 (1st Cir. 1989). *See generally, In re Grand Jury Subpoenas*, 902 F. 2d 244 (4th Cir. 1990); *Eisenberg v. Gagnon*, 766 F. 2d 770, 787 (3d Cir.), *cert denied* 474 U.S. 946 (1985); *Wilcoxon v. United States*, 231 F. 2d 384, 385 (10th Cir.), *cert denied* 351 U.S. 943 (1956).

The Court of Appeals order irrationally eradicates the corporate individual's ability to enter into such privileged arrangements with corporations or other entities or individuals with whom he shares a common interest or joint defense. The ultimate effect is to create variable "classes" of individuals who may assert the attorney-client privilege as well as a "sliding scale" for ascertaining the existence of the privilege, based upon factors never before articulated by this Court and contrary to the basic principles of common law. Although the common interest doctrine and the joint defense privilege are recognized legal principles which promote shared information and the seeking of legal advice to avoid litigation or liability, the lower court's decision unfairly excludes a class of individuals from protections which exist for others who do not bear the "affliction" of serving as a corporate employee or officer. Finally, the decision appears to exclude corporate employees or officers from the benefits that may exist, both economically or practically, under joint representation, which is permitted under the Model Rules of Professional Conduct. See Model Rule 1.13 (3)(Permits lawyer representing organization to also represent officers, directors, employees or shareholders in a dual representative role subject to the provisions of Model Rule 1.7.) Again, the Court of Appeals decision, in its broadest form, fails to promote the predictability that has been urged by this Court.

Significantly, the Tenth Circuit's opinion extended the privilege to only a very small portion of communications in which Petitioner sought legal advice as to his personal liability without regard to any corporate considerations. This condition is axiomatic since often the very reason any corporate employee or officer may seek personal legal advice as to personal liability will be premised on exposure in the work place; this is particularly true in the highly regulated and investigated field of health care. In such instances, it

impossible to create a "bright red line" as to corporate duties and personal liability. Frequently the lines will blur or overlap. The Court of Appeals' decision therefore unfairly excludes a class of citizens from the full protections that the privilege is meant to provide.

Petitioner asks this Court to grant certiorari to address the conflicting opinions within the circuits as to the proper standard of review to be utilized to determine the existence and/or assertion of an attorney-client relationship as well as the propriety of the fifth prong of the Second and Third Circuit test. Petitioner respectfully submits based upon the aforementioned reasons that the appropriate test is the Reasonable Belief Standard.

II. WHETHER, ONCE THE DISTRICT COURT DETERMINED THAT THE CRIME-FRAUD EXCEPTION APPLIED WITH RESPECT TO CONSULTING AGREEMENTS BETWEEN DOCTORS AND A HOSPITAL, IT COULD INDISCRIMINATELY DECLARE THAT EVERY ACT OR COMMUNICATION WITH COUNSEL ABOUT THE ASSOCIATION DURING THE TEN YEAR RELATIONSHIP WAS SUBJECT TO DISCLOSURE UNDER THE EXCEPTION

The District Court, in its order filed on May 1, 1997, found that, based upon the operation of the crime-fraud exception, that the attorneys could no longer invoke either the attorney-client privilege or the work product doctrine with regard to the subject matter of the grand jury inquiry. The Court specifically held that the Government had established by substantial and competent evidence a *prima facie* case that BMC and Petitioner had committed a crime, that BMC and Petitioner used the legal services of the

attorneys to further that crime, and that the attorneys were aware of the criminal conduct. Accordingly, the district court ruled that it did not need to set forth in the order, with any specificity, which grand jury questions implicated the attorney-client privilege or work product doctrine because the crime-fraud exception vitiated the privileges in the case. The order defined the scope of the exception to apply to

> any act, communication, document or other matter concerning the relationships and agreements, (whether formal or informal, written or unwritten, executed or proposed) between BMC and Robert LaHue, Ronald LaHue, BVMG, BVMG officers and employees, Johnson County Medical Laboratory or Johnson County Medical Laboratory officers and employees during the time period September 1, 1984 through 1994.

The Tenth Circuit found the district court's order properly delineated a reasonable time period and narrowed the focus to questions regarding the relationship at issue. Petitioner respectfully submits that the application of the crime-fraud exception in this case was overly broad and lacked specificity, thereby violating the applicable attorney-client privilege and work product doctrine.

The crime-fraud exception to the attorney-client privilege and work product doctrine provides that if an attorney is retained to further present or intended illegal activity, the privilege will not survive. It is the purpose of this exception to assure that the "seal of secrecy" between the lawyer and client does not extend to communications "made for the purposes of getting advice for the commission of

fraud or crime." *United States v. Zolin*, 491 U.S. 554, 563 (1989); *See e.g., Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995), *cert denied* 517 U.S. 1190 (1996). However, the crime-fraud exception does not apply to clients who make full disclosure to their attorneys of past wrongdoings, in order that the client may obtain the aid of persons having knowledge of the law and skilled in its practice. *United States v. Zolin, 491 U.S. at 562; In re Grand Jury Subpoena Duces Tecum (Marc Rich, A.G.)*, 731 F. 2d 1032, 1041 (2d Cir. 1984) (Communications with respect to advice as to past or completed frauds are within the privilege.) The exception does not apply to communications made for the purpose of ensuring that the client's future actions conform to the requirements of the law. *United States v. Dyer*, 722 F. 2d 174, 177 (5th Cir. 1983)(refusing to apply the crime-fraud exception to communications with an attorney which appeared to provide sound and legal advice to return bribe money.)

Case law clearly indicates that the application of the proper scope of the crime-fraud exception is in disarray throughout the circuits. Some courts have held that the exception applies for the purpose of limiting certain client activity, see *In re Grand Jury Subpoena Duces Tecum (Marc Rich, A.G.)*, 731 F. 2d at 1038; other courts view it as a limitation on the abuse of the attorney-client relationship. See *In re Sealed Case*, 676 F. 2d 793, 812 (D.C. Cir. 1982). Courts have narrowly construed the scope to only limited documents. See *In re Grand Jury Proceedings*, 938 F. 2d 1578, 1582 (11th Cir. 1991) (memorandum of attorney-client communication was privileged even though its contents concerned prior communications which were discoverable under the crime-fraud exception. Simply because the prior communications were discoverable did not automatically yield the same conclusion under the crime-fraud exception as

to subsequent communications); *Motley v. Marathon Oil Co.*, 71 F. 3d at 1549. Other courts have broadly interpreted its application. *In re Grand Jury Proceedings (FMC Corp.)*, 604 F. 2d 798 (3d Cir. 1979). Yet under any standard, the district court's application of the crime-fraud exception in this case for a ten year period and encompassing all acts, communications and documents was overly broad and without specificity. The scope of the crime-fraud exception in this case failed to properly protect untainted attorney-client communications.

During the April 7, 1997 hearing, the district court held that its decision that the crime-fraud exception applied from September 1, 1984 "was just for the point and sake of picking an arbitrary date to make late 1984 more clear." The district court failed to provide any basis or rationale why the dates from 1984 to 1994 were applicable, or why all acts or communications were subject to the exception. The district court made no attempt to distinguish those lawful communications which might be protected by the privilege; those activities which may not have been in furtherance of illegal activity. The court failed to (1) ascertain corporate policy concerning the issue that was the subject of the confidential communication, which would circumstantially aid in a determination as to the intent of the communication and (2) the reason behind the communication. See e.g., *CFTC v. Weintraub,* 471 U.S. 343 (1985); *Upjohn Co. v. United States*, 449 U.S. 383 (1983). The record is devoid of any basis for the breadth or scope of the district court's order.

Similarly, the district court failed to review the individual questions which were to be posed to the attorneys. Even if there is a showing that some of the communications between an attorney and the client are in furtherance of a crime, the protection afforded by the privilege is not stripped

from all communications. *In re Antitrust Grand Jury*, 805 F. 2d 169 (6th Cir. 1986); *In re September 1978 Grand Jury (II)*, 640 F. 2d 49, 59-61 (7th Cir. 1980). The attorneys in this case represented Mr. Anderson during a volatile time in health care law development. Uncertainty existed in the mid to late 1980's as to which commercial arrangements were legitimate and which were prosecuted. Statutes provided little meaningful guidance to health care professionals faced with the task of complying with them. *See Eleventh Survey of White Collar Crime,* 33 Am. Crim. L. Rev. 511, 826 (1996) (noting that the Anti-Kickback statute, on its face, seemed to prohibit not just what most people think as patently illegal commerce but also practices commonly accepted in businesses and professions unrelated to health care.) Safe harbors were created in the health care industry to help set parameters for lawful consulting contracts. *See* Pamela Bucy, *Crimes by Health Care Providers,* 1996 U. Ill. L. Rev. 589, 610. In this context, it is difficult to assume that all acts, communications or documents related to the negotiations or implementation of consulting agreements between BMC and BVMG were subject to the crime-fraud exception.

Ms. Lehr represented BMC and Mr. Anderson from 1984 to 1991. Mr. Thompson, at a separate law firm, represented BMC and Mr. Anderson from 1991 forward. Thus each attorney represented Petitioner at a different time and in somewhat different capacities. The district court's order failed to distinguish this situation.

The piercing of the veil of confidentiality protected by the attorney-client privilege is a draconian exception which should be applied carefully and prudently. In the present case, the district court failed to take steps to properly

preserve legitimate assertion of the privilege.[5] Petitioner asks this Court to review the applicable standard in determining the proper scope of the crime-fraud exception. However, under any standard, the scope of the crime-fraud exception in this case was overly broad and indiscriminate.

CONCLUSION

Petitioner respectfully requests this Court to find that the proper standard for determining the existence or assertion of the attorney-client privilege is the Reasonable Belief test. Petitioner contends that the United States Court of Appeals for the Tenth Circuit has rendered its decision in conflict with prior decisions of this Court, or, alternatively, had decided an important question of federal law which has not been but should be settled by this Court; the proper test to be applied in determining the assertion of the attorney-client privilege. Petitioner also contends that the district court indiscriminately applied the crime-fraud exception in this case, thereby depriving the Petitioner of the confidentiality of privileged communications, in contradiction to the common law and his rights to due process under the fifth and fourteenth amendments to the United States Constitution.

5This is particularly true in light of the district court's utilization of a standard of proof for the establishment of a *prima facie* showing which merely required "more than a mere possibility." Likewise, the district court, in its discretion, refused to disclose the in camera, ex parte good faith statement and to permit the Petitioner to present rebuttal evidence which would overcome the Government's *prima facie* showing.

Respectfully submitted,

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APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IN RE: GRAND JURY SUBPOENAS,
Jane Roe and John Doe.

INTERVENOR,

No. 97-3120

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 97-CV-1281)

James R. Wyrsch (Jacqueline A. Cook, with him on the briefs), Wyrsch Hobbs Mirakian & Lee, P.C., Kansas City, Missouri, for Appellant.

Tanya Treadway, Assistant United States Attorney (Jackie N. Williams, United States Attorney, with her on the brief),Kansas City, Kansas, for Appellee.

Before **ANDERSON** and **KELLY,** Circuit Judges, and **BRETT,*** District Judge,

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ANDERSON, Circuit Judge.

Intervenor-Appellant[1] appeals from the district court's order compelling the testimony of two attorneys, John Doe and Jane Roe, before a federal grand jury. He argues that the district court erred by: (1) applying the crime-fraud exception to attorney-client privilege to compel the attorneys' testimony; (2) applying the exception too broadly and refusing to review the questions to be asked of the attorneys before the grand jury; (3) refusing to disclose or to allow rebuttal of the government's in camera, ex parte showing that the crime-fraud exception applied; and (4) prohibiting the attorneys from invoking Intervenor's Fifth Amendment right against self-incrimination. The government challenges Intervenor's standing to bring the present appeal. We affirm.

BACKGROUND

Intervenor, several hospitals, doctors, and others are targets of an ongoing federal grand jury investigation. The Hospital, which employed Intervenor as President and Chief

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* The Honorable Thomas R. Brett, Senior U.S. District Judge, United States District Court of the Northern District of Oklahoma, sitting by designation.

1Because Appellant is the subject of a grand jury investigation, he is referred to herein as "Intervenor" pursuant to Fed. R. Crim. P. 6(e). Likewise, the hospital for which he worked will be referred to as "The Hospital." The two attorneys involved will be referred to as "John Doe" and "Jane Roe."

Executive Officer during the relevant time periods, responded to the grand jury's subpoenas duces tecum by producing numerous documents, some of which implicated the use of attorneys John Doe and Jane Roe to effectuate the crimes. Doe and Roe provided legal services to The Hospital during the time of the alleged criminal activity. The Hospital and Intervenor also sought the advice of other attorneys after the FBI initiated its investigation in 1992.

The grand jury issued subpoenas seeking the testimony of Doe and Roe before it on January 21, 1997. The Hospital, Doe and Roe moved, on January 16, 1997, to quash the subpoenas because of the attorney-client privilege and the work-product doctrine (referred to hereinafter as "privileges" for convenience) and because the testimony would violate The Hospital's Sixth Amendment right to counsel. That same day, Intervenor moved to intervene and to quash the subpoenas, asserting the privileges on the basis of his relationship with the attorneys in his individual capacity, independent of the attorneys' relationship with The Hospital and its officers in their official capacity. On January 30, 1997, the government filed a response to the motions, arguing, inter alia, that the parties had failed to prove entitlement to the privileges, that The Hospital's production of documents waived the privileges, and that the crime-fraud exception vitiates the privileges. In support of its position, the government simultaneously filed an in camera, ex parte good faith statement of evidence as to the alleged criminal activity, which Doe, Roe, The Hospital, and Intervenor have not been permitted to view.

The district court conducted a hearing on the motions on February 24, 1997. The court granted Intervenor's motion to intervene, but found that the crime-fraud exception to the attorney-client privilege applied because the government had established a prima facie case that The Hospital had engaged in

criminal or fraudulent conduct, which was furthered by the aid of Roe and Doe. The court accordingly denied the motions to quash, subject to further development of the record, including specific questions and answers before the grand jury. The court refused to permit movants to view the government's good faith statement of evidence or to conduct a separate hearing at which movants could attempt to rebut the evidence, although the court did allow counsel for Intervenor to present arguments intended to rebut the prima facie showing.

On March 19, 1997, Ms. Roe appeared before the grand jury and asserted the attorney-client privilege and the work-product doctrine in response to virtually every question asked of her. She also vicariously raised Intervenor's Fifth Amendment right against self-incrimination at his request. Mr. Doe appeared before the grand jury on April 2, 1997, and did the same. On March 25, 1997, the government moved to compel Ms. Roe's testimony, and it orally moved to compel Mr. Doe's testimony on April 2, 1997. Mr. Doe and Ms. Roe responded to the motion to compel, and The Hospital and Intervenor moved to intervene.

The court conducted hearings on the motions on April 2 and 7, 1997, during which the court heard the testimony of Mr. Doe, Ms. Roe, and Intervenor regarding any attorney-client relationship between the attorneys and Intervenor in his individual capacity. The court granted both motions to intervene because "for purposes of the motion to intervene,... the attorney-client privilege has been sufficiently established, and the Court would find that at relevant times [Ms. Roe and Mr. Doe] were providing joint representation to [The Hospital and to Intervenor]." Appellee's Supplemental App. at 305.

At the April 7, 1997, hearing, the government presented further in camera, ex parte evidence of the involvement of Ms.

Roe and Mr. Doe in the criminal activity. The district court found that the crime-fraud exception applied, and the court orally sustained the government's motion to compel the testimony of Ms. Roe and Mr. Doe. The Hospital and Intervenor indicted their intent to file an appeal and moved to stay the proceedings pending the appeal. Subsequently, on May 1, 1997, the court entered its written order (1) sustaining the motion to compel testimony of Ms. Roe and Mr. Doe; (2) overruling Intervenor's request that Ms. Roe and Mr. Doe be allowed to assert Intervenor's Fifth Amendment right against self-incrimination; and (3) granting the motion to stay pending appeal. Intervenor appeals the first two decisions.[2]

DISCUSSION

In general, the granting of a motion to compel testimony is interlocutory in nature and is not an appealable order. In re Grand Jury Proceedings (Company X), 857 F. 2d 710, 711 (10th Cir. 1988). The present case, however, comes within an exception to that general rule as announced in Perlman v. United States, 247 U.S. 7 (1918). Because Doe and Roe have indicated their intent to comply with the order rather than risk contempt, the order is appealable and we have jurisdiction pursuant to 28 U.S.C. § 1291. See In re Grand Jury Proceedings (Company X), 857 F. 2d at 711-12; In re Grand Jury Proceedings (Vargas), 723 F. 2d 1461, 1466 (10th Cir. 1983; see also United States v. Nixon, 418 U.S. 683, 690-91

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2 Mr. Doe and Mr. Roe did not appeal the decision. The Hospital appealed, but, upon its motion, the appeal was dismissed. Pursuant to a settlement agreement with the government, The Hospital agreed to waive its prior assertion of the attorney-client privilege and the work-product doctrine as to any document or information concerning contracts between it and the doctors from September 1, 1984, to February 1, 1995. See Appellee's Supplemental App. at 331-32.

(1974); In re Grand Jury Subpoenas Dated December 7 and 8, 40 F. 3d 1096, 1099 (10th Cir. 1994).

I. Attorney-Client Privilege and Standing

The government argues that Intervenor lacks standing to bring this appeal because he was never a client of Doe or Roe in his individual capacity, and, therefore, he cannot assert the attorney-client privilege. When the district court granted Intervenor's motion to intervene, it found that the attorney-client privilege existed for the limited purposes of moving to quash the testimony of Roe and Doe and of objecting to the government's motion to compel the testimony. See Appellee's Supplemental App. at 288, 305. At the time of the court's decision, The Hospital was still involved in the case and was asserting the attorney-client privilege in an attempt to prevent Roe and Doe from testifying before the grand jury. Subsequently, The Hospital and the government reached a settlement agreement, and The Hospital no longer asserts the attorney-client privilege for itself or its officers so as to prevent the grand jury testimony of Doe and Roe. Intervenor, therefore, must prove the existence of an attorney-client privilege for himself in his individual capacity.

We review the issue of standing de novo. See Committee to Save the Rio Hondo v. Lucero, 102 F. 3d 445, 447 (10th Cir. 1996). We review the factual findings underlying the court's attorney-client privilege ruling for clear error and purely legal questions de novo. See Frontier Refining Inc. v. Gorman-Rupp Co., 136 F. 3d 695, 699 (10th Cir. 1998).

"The doctrine of standing 'is an essential and unchanging part of the case-or-controversy requirement of Article III." Lucero, 102 F. 3d at 447 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). To satisfy the standing requirement, "a party must establish three

elements: (1) injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) likelihood that the injury will be redressed by a favorable decision." Wilson v. Glenwood Intermountain Properties, Inc., 98 F. 3d 590, 593 (10th Cir. 1996). In the present case, Intervenor's ability to satisfy the elements required for standing is inextricably tied to his ability to claim the attorney-client privilege. If the attorney-client privilege does exist between Intervenor in his individual capacity and Attorneys Roe and Doe, then Intervenor has standing. See Henderson v. United States, 815 F. 2d 1189, 1192 (8th Cir. 1987); Young v. Taylor, 466 F. 2d 1329, 1333 (10th Cir. 1972).

The party seeking to assert the attorney-client privilege has the burden of establishing its applicability. Motley v. Marathon Oil Co., 71 F. 3d 1547, 1550 (10th Cir. 1995). The privilege is governed by the common law and is to be strictly construed. Trammel v. United States, 445 U.S. 40, 47, 50 (1980); In re Grand Jury Proceedings of John Doe v. United States, 842 F. 2d 244, 245-46 (10th Cir. 1988). "The purpose behind the attorney-client privilege is to preserve confidential communications between attorney and client." In re Grand Jury Subpoenas (United States v. Anderson), 906 F. 2d 1485, 1492 (10th Cir. 1990). Where a corporate client is involved, "special problems" arise because, "[a]s an inanimate entity, a corporation must act through agents." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). Any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation's affairs and the officer's duties belongs to the corporation and not to the officer. See United States v. International Bhd. of Teamsters, 119 F. 3d 210, 215 (2d Cir. 1997); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F. 2d 120, 124 (3d Cir. 1986); see also Weintraub, 471 U.S. at 348-49; Upjohn Co. v. United

States, 449 U.S. 383, 394-95 (1981). Thus, Intervenor has no power to assert the attorney-client privilege except as to confidential communications with Doe and Roe in his individual capacity, which is unlikely to be anything more than a minute portion of the total communications sought by the grand jury.

The Second and Third Circuits have employed the following test to determine whether an officer may assert a personal privilege with respect to conversations with corporate counsel despite the fact that the privilege generally belongs to the corporation:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

International Bhd. of Teamsters, 119 F. 3d at 215 (quoting In re Bevill, 805 F. 2d at 123 (quoting In re Grand Jury Investigation, 575 F. Supp. 777, 780 (N.D. Ga. 1983))). A personal privilege does not exist merely because of the officer "reasonably believed" that he was being represented by corporate counsel on an individual basis. International Bhd. of

Teamsters, 119 F. 3d at 216. In certain circumstances, reasonable belief may be enough to create an attorney-client *relationship*, but it is not sufficient here to create a *personal* attorney-client *privilege*. See Cole v. Ruidoso Mun. Sch., 43 F. 3d 1373, 1384 (10th Cir. 1994) (holding, in context of motion to disqualify counsel, attorney-client *relationship* exists where party submits confidential information to a lawyer and it does so with a reasonable belief that the lawyer was acting as its attorney).

The district court heard the testimony of Intervenor, Ms. Roe, and Mr. Doe concerning the existence of a personal attorney-client privilege. Each of them testified that Intervenor sought the advice of the attorneys in his individual capacity and that confidential communications occurred between them as to his personal situation. Doe and Roe testified that they recognized a potential conflict of interest. The court concluded that "for purposes of the motion to intervene,...the attorney-client privilege has been sufficiently established, and the Court would find that at relevant times [Ms. Roe and Mr. Doe] were providing joint representation to [The Hospital and to Intervenor]." Appellee's Supplemental App. at 305. In making this finding, the district court necessarily relied on the credibility of the witnesses before it and on facts which have not been demonstrated to us to be clearly erroneous.

Accordingly, adopting and applying the test employed by the Second and Third Circuits, we conclude that a limited attorney-client privilege exists between Intervenor and Roe and Doe. Our holding is an extremely limited one and does not extend to communications made while the third parties were present nor does it extend to communication in which both corporate and individual liability were discussed. It includes only that very small portion of communications in which Intervenor sought legal advice as to his personal liability

without regard to any corporate considerations. To the limited extent there is a privilege then, Intervenor has standing.

II. Application of Crim-Fraud Exception

Next, we address, whether, in light of the limited attorney-client privilege, that privilege is vitiated by the crime-fraud exception. We review the district court's granting of the motion to compel and its determination that the crime-fraud exception applies for abuse of discretion. In re Grand Jury Proceedings (Company X), 857 F. 2d at 712. We will not disturb the court's exercise of its discretion unless we have a "definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Moothart v. Bell, 21 F. 3d 1499, 1504 (10th Cir. 1994) (quotation omitted).

The importance and sanctity of the attorney-client privilege is well established. See Upjohn v. United States, 449 U.S. 383, 389 (1981). Yet, the privilege is not worthy of protection "at all costs" as Intervenor suggests. Appellant's Br. at 49. Because it "'withhold[s] relevant information from the fact finder,'" United States v. Zolin, 491 U.S. 554, 562 (1989) (citation omitted), the "'attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud.'" Motley v. Marathon Oil Co., 71 F. 3d 1547, 1551 (10th Cir. 1995) (quoting In re Grand Jury Proceedings (Company X), 857 F. 2d 710, 712 (10th Cir. 1988)). "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy,' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." Zolin, 491 U.S. at 563 (citations omitted). The crime-fraud exception applies to both the attorney-client privilege and

the work-product doctrine. In re Grand Jury Proceedings (Vargas), 723 F. 2d 1461, 1467 (10th Cir. 1983).

To invoke the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact. Motley, 71 F. 3d at 1551; In re Grand Jury Proceedings (Vargas), 723 F. 2d at 1467. The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it. See In re Grand Jury Investigation (Schroeder), 842 F. 2d 1223, 1226 (11th Cir. 1987). The exception does not apply if the assistance is sought only to disclose past wrongdoing, see Zolin, 491 U.S. at 562, but it does apply if the assistance was used to cover up and perpetuate the crime or fraud. See In re Grand Jury Proceedings (Company X), 857 F. 2d at 712; see also In re Grand Jury Proceedings (Doe), 102 F. 3d 748, 749-51 (4th Cir. 1996) (applying exception where client used lawyers, without their knowledge, to misrepresent or to conceal what the client had already done); In re Richard Roe, Inc., 68 F. 3d 38, 40 (2d Cir. 1995) (noting that exception applies where "communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity"); In re Sealed Case, 754 F. 2d 395, 402 (D.C. Cir. 1985) ("To the limited extent that past acts of misconduct were the subject of the cover-up that occurred during the period of representation, however, then past violations properly may be a subject of grand jury inquiry.")

Although the exact quantum of proof necessary to meet the prima facie standard has not been decided by the Supreme Court, see Zolin, 491 U.S. at 563-64 & n. 7, several circuits have attempted to define precisely what the standard requires.

See, e.g., In re Richard Roe, Inc., 68 F. 3d 38, 40 (2d Cir. 1995) (probable cause to believe a crime or fraud has been committed); Haines v. Liggett Group Inc., 975 F. 2d 81, 95-96 (3d Cir. 1992) (evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); In re International Sys. & Controls Corp. Sec. Litig., 693 F. 2d 1235, 1242 (5th Cir. 1982) (evidence such as will suffice until contradicted and overcome by other evidence); United States v. Davis, 1 F. 3d 606, 609 (7th Cir. 1993) (evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); In re Grand Jury Proceedings (Corporation), 87 F. 3d 377, 381 (9th Cir. 1996) (reasonable cause to believe attorney was used in furtherance of ongoing scheme); In re Grand Jury Investigation (Schroeder), 842 F. 2d 1223, 1226 (11th Cir. 1987) (evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed); In re Sealed Case, 107 F. 3d 46, 50 (D.C. Cir. 1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud). We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.

The court below found that the government had "established by substantial and competent evidence a prima facie case that [The Hospital and Intervenor] have committed a crime, that [The Hospital and Intervenor] used the legal services of Roe and Doe in furtherance of that crime, and that Roe and Doe were aware of the criminal conduct." Appellant's App. vol. II at 226. We have reviewed the record, including the government's ex parte, in camera submission, and conclude that the district court did not abuse its discretion. The evidence

presented constitutes a prima facie showing that the services of Mr. Doe and Ms. Roe were used both to effectuate the crime or fraud and to conceal it. Thus, the crime-fraud exception vitiates the limited attorney-client privilege between Intervenor and Roe and Doe.[3]

III. Scope of the Crime-Fraud Exception

Intervenor asserts that even if the exception does apply, the district court's application of the exception lacked specificity and was overly broad. The court held that because the exception applies, Roe and Doe could not "avoid testifying as to any act, communication, document or other matter concerning the relationships and agreements (whether formal or informal, written or unwritten, executed or proposed) between [The Hospital and the doctors, two of their companies, its officers or employees] during the time period September 1, 1984 through 1994." Appellant's App. Vol. II at 226-27.

Intervenor argues that the time period defined by the court is arbitrary and covers too great a period and that , as a result, it may include communications that do not fall within the crime-fraud exception. Given our review of the record, we disagree. The court properly delineated a reasonable time period and further narrowed the focus to questions regarding the relationship at issue. Accordingly, we conclude that the court did not err in defining the scope of the crime-fraud exception.

Similarly, Intervenor contends that the district court's decision to apply the crime-fraud exception was error because

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3 We by no means imply that Doe and Roe are guilty of any crimes or that they were, in fact, culpable in any way. Indeed, no charges have been filed against them.

is refused to review, in camera, the government's proposed questions to Doe and Roe. Without such a review, he argues, the court could not have properly determined whether some of the questions--and their answers-- would fall outside the scope of the exception.

In In re Grand Jury Proceedings (Vargas), 723 F. 2d at 1467, we held that "once the trial judge has concluded that the privilege does not apply because the government has made such a prima facie showing, the trial court need only conduct an in camera inspection of the documents if there is a possibility that some of them may fall outside the scope of the exception to the privilege." We have not addressed whether it is appropriate for a similar "inspection" to be made of testimony to be presented to a grand jury.

We recognize the need to balance the confidentiality of privileged information outside the scope of the crime-fraud exception and the conservation of judicial resources. We have encouraged the district courts not to allow the determination of the applicability of the crime-fraud exception to turn into minitrials that would waste resources and dely the grand jury proceedings. See In re Grand Jury Proceedings (Company X), 857 F. 2d at 712; In re Grand Jury Proceedings (Vargas), 723 F. 2d at 1467. Accordingly, we will not require that the district court conduct a detailed review of all questions and answers prior to their presentation to the grand jury. Instead, district courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited before the grand jury. However, if, before ordering testimony in front of the grand jury, the district court, within its discretion, believes an in camera examination of the witness or the questions to be asked of the witness is needed to

ensure the scope of the inquiry will not be too broad, it may do so.[4] See In re Richard Roe, Inc., 68 F. 3d at 41.

At the April 7, 1997, hearing in this case, the court did hear objections to specific questions that has been asked before the grand jury previously. The court concluded that not only did they fall within the scope of the crime-fraud exception, but also that much of the information sought did not even relate to anything that could be considered privileged. Appellee's Supplemental App. at 309-29. In addition, the court's order makes it clear that it had, in fact, reviewed the questions already asked of Roe and Doe. Appellant's App. Vol. II at 226.

Given the court's review of the questions and its limited definition of the scope of the crime-fraud exception, we do not believe it abused its discretion in failing to set forth, question by question, what could and could not be asked of Doe and Roe. The court's order appropriately requires Roe and Doe "to answer the questions previously posed [before the grand jury], as well as any other questions on those topics." Appellant's App. Vol. II at 227.

IV. Rebuttal to Government's Prima Facie Showing

Intervenor next alleges that the district court erred because it believed it had no discretion (1) to disclose to

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4 We recognize that in one case, the D.C. Circuit required the district court to engage in a question-by-question determination of the scope of the crime-fraud exception "given the nebulous distinction in this case between prior acts that remain protected by the attorney-client privilege and prior acts forming the basis of the ongoing cover-up." In re Sealed Case, 754 F. 2d 395, 402-03 (D.C. Cir. 1985). We believe, as the Second Circuit did in In re Richard Roe, Inc., 68 F. 3d at 41, that the narrow scope of the district court's order makes such a *mandatory* review unnecessary.

Intervenor the government's ex parte, in camera submission, and (2) to hear rebuttal evidence from Intervenor as to the government's prima facie showing of the crime-fraud exception.

In In re Grand Jury Proceedings (Vargas), 723 F. 2d 1461 (10th Cir. 1983), we faced Intervenor's present argument, minus the allegation of the district court's misperception of its authority. We stated as follows:

> Petitioner. . . argues that certain procedures must be followed, including an opportunity for the attorney and client to rebut the prima facie evidence and to be present at any hearing which is intended to establish such a prima facie foundation. Petitioner misconstrues the law in this circuit. As this court held in its opinion In re September 1975 Grand Jury Term, 532 F. 2d 734 (10th Cir. 1976), "[t]he determination of whether the government shows a prima facie foundation in fact for the charge which results in the subpoena lies in the sound discretion of the trial court." Id, at 737. *In particular, that determination can be made ex-parte and a "preliminary minitrial" is not necessary.* Id. at 737-38. Furthermore, the prima facie foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury.

In re Grand Jury Proceedings (Vargas), 723 F. 2d at 1467 (emphasis added) (citations to the record omitted). Such expedited procedures do not violate due process. See In re Grand Jury Proceedings, Thursday Special Grand Jury, 33 F. 3d

342, 352-53 (4th Cir. 1994); In re John Doe, Inc., 13 F. 3d 633, 637 (2d Cir. 1994).

This framework is grounded in the importance of a properly functioning grand jury. As the Supreme Court has stated, "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." United States v. Dionisio, 410 U.S. 1, 17 (1973); see also In re September 1975 Grand Jury Term, 532 F. 2d at 737. Moreover, the reasons for keeping a tight lid on in camera documents containing grand jury testimony and on evidence gathered during criminal investigations are legion and obvious. See, e.g., In re Grand Jury 95-1, 118 F. 3d 1433, 1439 (10th Cir. 1997).

Accordingly, the district court has the discretionary authority to do as Intervenor requests, and we believe the court understood that authority. Intervenor points to the February 24, 1997, hearing to show that the court did not understand it has discretionary authority. There, the district court queried, "if I let you see the contents of [the government's] showing, [aren't you] just setting this up to get me involved in having the sort of minitrial on the criminal allegations that the courts have said I shouldn't be involved in?" Appellant's App. vol II at 240. Unfortunately for Intervenor, the court's question implies that it understood it had authority, pursuant to the familiar Fed. R. Crim. P. 6(e), to make the submission available to Intervenor. Our review of the record also indicates that the court understood it had the authority to hear rebuttal evidence.

The district court did not abuse its discretion in refusing to allow Intervenor to review the contents of the government's ex parte, in camera submission and in refusing to

hear rebuttal evidence. The court reviewed the many briefs that had been filed and actually entertained some of counsel's arguments intended to rebut the government's prima facie showing. See, e.g., Appellant's App. Vol. II at 241-51. After reviewing the briefs, hearings, and the government's submission, we find no abuse in either the district court's refusal to conduct a separate rebuttal hearing or its refusal to reveal the contents of the government's submission.

V. Vicarious Assertion of Intervenor's Fifth Amendment Rights

Finally, Intervenor claims that Roe and Doe should be allowed to assert his Fifth Amendment right against self-incrimination. We review the district court's denial of this claims de novo because it involves a question of standing. See United States v. Anderson, 778 F. 2d 602, 606 n.3 (10th Circ. 1985); United States v. Skolek, 474 F. 2d 582, 584 (10th Cir. 1973); see also Committee to Save the Rio Hondo v. Lucero, 102 F. 3d 445, 447 (10th Cir. 1996).

"There is not constitutional right not to be incriminated by the testimony of another. . . The privilege against self-incrimination is solely for the benefit of the witness and is purely a personal privilege of the witness, not for the protection of other parties." Skolek, 474 F. 2d at 584. The Fifth Amendment protects against "'compelled self-incrimination, not (the disclosure of) private information.'" Fisher v. United States, 425 U.S. 391, 401 (1976) (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)). Thus, a "party is privileged from producing evidence but not from its production.'" Fisher, 425 U.S. at 399 (quoting Johnson v. United States, 228 U.S. 457, 458 (1913)). The relevant question for our analysis, then, is whether the information was

obtained through compulsion, not whether the information was private.

In certain circumstances, where an attorney is being compelled to produce *documents* that his or her client could personally bar from production under the Fifth Amendment, " the *attorney* to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena." Fisher, 425 U.S. at 396. However, the instant case is different because the information sought is the content of oral statements made by Intervenor that were not compelled. In re Feldberg, 862 F. 2d 622, 629 (7th Cir. 1988); In re Grand Jury Proceedings (Wilson), 760 F. 2d 26, 27 (1st Cir. 1985). Compulsion of the attorneys' testimony as to voluntary statements made by the client does not, therefore, implicate the Fifth Amendment's protection of the client against "compulsory self-incrimination." Feldberg, 862 F. 2d at 629. The statements might be protected by the attorney-client privilege, but not where, as here, the crime-fraud exception applies.

Thus, because there is no indication that Intervenor's statements to his attorney were compelled and because the crime-fraud exception vitiates any attorney-client privilege, the district court correctly ordered that Ms. Roe and Mr. Doe could not vicariously assert Intervenor's Fifth Amendment rights before the grand jury.

Conclusion

For the foregoing reasons, we AFFIRM the district Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**Case No.**
	)	**97-2181-KHV**
JANE ROE, AND	)	
JOHN DOE,	)	
	)	
Defendants.	)	
	)	

FILED UNDER SEAL

ORDER

Jane Roe and John Doe have refused to answer questions before the grand jury, invoking both the attorney/client privilege and the work product immunity doctrine. This matter is before the Court on the government's Motion To Compel Testimony (Doc. #30) filed April 2, 1997, Dan Anderson's Motion To Stay Proceedings Pending Appeal (Doc. #41) filed April 8, 1997, and the oral motion to stay by Baptist Medical Center on April 7, 1997.

On February 24, 1997, the Court held a hearing on the Motion To Quash (Doc. #1) grand jury subpoenas filed by Roe and Doe on January 16, 1997, and on Dan Anderson's Motion To Intervene And Quash Or In The Alternative For A Protective Order (Doc. #2). Prior to the hearing the parties had fully briefed the attorney/client and work product issues.

On April 2 and April 7, 1997, the Court heard further argument about the questions posed to Roe and Doe before the grand jury. In addition, the Court reviewed transcripts of the grand jury testimony of Roe and Doe and the government's ex parte *in camera* submissions on the crime-fraud exception. Based on the arguments presented in the parties' briefs concerning the motions to quash and the motion to compel, the Court makes the following findings.

The Court finds that because of the operation of the crime-fraud exception, Roe and Doe can no longer invoke either the attorney/client privilege or the work product immunity doctrine with regard to the subject matter of the grand jury inquiry. The government has established by substantial and competent evidence a prima facie case that Baptist Medical Center and Dan Anderson have committed a crime, that Baptist Medical Center and Anderson used the leal services of Roe and Doe in furtherance of that crime, and that Roe and Doe were aware of the criminal conduct. Accordingly, the Court need not set forth in this order which grand jury questions implicated the attorney/client privilege or the work product immunity doctrine; the crime-fraud exception vitiates both privileges in this case.

Because the crime-fraud exception applies, Roe and Doe cannot use attorney client privilege or the work product immunity doctrine to avoid testifying as to any act, communication, document or other matter concerning the relationships and agreements (whether formal or informal, written or unwritten, executed or proposed) between Baptist Medical Center and Robert LaHue, Ronald LaHue, Blue Valley Medical Group, Blue Valley Medical Group officers and employees, Johnson County Medical Laboratory, or Johnson County Medical Laboratory officers and employees, during the time period September 1, 1984 through 1994. The Court

therefore compels Roe and Doe to testify before the grand jury and to answer the questions previously posed by the Assistant United States Attorney, as well as any other questions on those topics.

In his motion to intervene and quash or in the alternative for a protective order, Anderson asks the Court to recognize a constitutional right to have Roe and Doe assert to the grand jury his Fifth Amendment privilege against self-incrimination. Anderson is not being compelled to testify, however, or to produce documents; consequently, he cannot have attorneys Roe and Doe assert his Fifth Amendment privilege vicariously. Couch v. United States, 409 U.S. 322, 328 (1973).

In ruling on the motions to stay pending appeal to the Tenth Circuit Court of Appeals, the Court is mindful of the applicable four part test: (1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay is not granted; (3) the absence of harm to the government if the stay is granted; and (4) any risk of harm to the public interest. See Tenth Circuit Local Rule 8.1; see also Hilton v. Braunskill, 481 U.S. 770, 776 (1987). The government opposes the motion to stay on the ground that this matter is not properly appealable, but does not deny that this matter is properly stayed pending appeal -- if an appeal is allowed.

The Court finds that the motion to stay should be granted. In In re Grand Jury Proceedings, Company X, v. United States, 857 F. 2d 710 (10th Cir. 1988), the Tenth circuit held under similar facts that a district court order which compelled counsel to produce documents to the grand jury under the crime-fraud exception is immediately appealable. Id. at 712. If the Court's ruling is not stayed pending appeal, the risk of irreparable harm to Anderson and Baptist Medical

Center is great. Without a stay, Roe and Doe will be required to testify before the next assembly of the grand jury. Any subsequent decision on appeal will be too late. Moreover, the government's investigation in this matter has been ongoing for years. Thus, movant' risk of harm outweighs any delay to the government and poses a low risk of harm to the public interest.

IT IS THEREFORE ORDERED that the government's Motion To Compel Testimony (Doc. #30) of Jane Roe and John Doe should be and hereby is sustained.

IT IS FURTHER ORDERED that intervenor Dan Anderson's request that Roe and Doe be allowed to effectively assert his Fifth Amendment privilege to the grand jury (see Motion to Intervene And Quash Or In The Alternative For A Protective Order (Doc. #2)) should be and hereby is overruled.

IT IS FURTHER ORDERED that Dan Anderson's Motion To Stay Proceedings Pending Appeal (Doc. #41) filed April 7, 1997, and the oral motion to stay of Baptist Medical Center made April 7, 1997, should be and hereby are granted. This matter is hereby stayed pending a determination on appeal.

Dated this 30th day of April, 1997, in Kansas City, Kansas.

s/_____

KATHERINE H. VRATIL
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: GRAND JURY SUBPOENAS,
Jane Roe and John Doe.

INTERVENOR,
Appellant,

v. No. 97-3120

UNITED STATES OF AMERICA,
Appellee.

ORDER
Filed June 23, 1998

Before **ANDERSON** and **KELLY,** Circuit Judges, and **BRETT,*** District Judge.

Appellant's petition for rehearing is denied.

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* The Honorable Thomas R. Brett, Senior U.S. District Judge, United States District Court of the Northern District of Oklahoma, sitting by designation

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

S/
by:
Deputy Clerk

CONSTITUTIONAL, STATUTORY, AND REGULATORY AUTHORITIES

Model Rules of Professional Conduct, Rule 1.6

Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonable believes necessary.

(1) to prevent the client from committing a crime; or

(2) to comply with requirements of law or orders of any tribunal; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Model Rules of Professional Conduct, Rule 1.7

Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct, Rule 1.13

Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed tot he organization, an dis likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to

appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer shall follow Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholder.

The Fifth Amendment of the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.